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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

LEE WAY MOTOR FREIGHT, INC., *Petitioner*

v.

MARCUS JONES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Lee Way Motor Freight, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 17, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 431 F. 2d 245. The opinion of the District Court for the Western District of Oklahoma is reported at 300 F. Supp. 653. Both opinions are reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 17, 1970. On November 3, 1970, Mr. Justice White extended the time for filing a petition for a writ of certiorari on behalf of Petitioner to December 16, 1970. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether employment statistics indicating an absence of Negroes from particular classifications of employment are, in and of themselves, a proper basis for concluding that an employer has engaged in unlawful discrimination within the meaning of Title VII of the Civil Rights Act of 1964.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

§ 2000e-2(a) [§ 703(a) of the Civil Rights Act of 1964]

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2(j) [§ 703(j) of the Civil Rights Act of 1964]

> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

STATEMENT OF THE CASE

This action under Title VII of the Civil Rights Act of 1964 was commenced by four Negro employees of petitioner (hereinafter "the Company"), contending that the Company's no-transfer policy as applied to them is unlawful because it tends to perpetuate their exclusion from a job classification from which they allegedly were prevented access at the time of their hire because of their race.[1]

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[1] The case was decided by the district court on the basis of a Stipulation of Facts (hereinafter "Stipulation"), the Company's Answers to Plaintiffs' Interrogatories (hereinafter "Interrogatories") and the depositions of plaintiffs Jones, Hodge and Nickles (hereinafter "Jones Deposition," "Hodge Deposition" and "Nickles Deposition"). References contained herein are to those documents. No printed record was filed with the Tenth Circuit.

Plaintiffs, all of whom were apparently hired prior to the effective date of the Civil Rights Act of 1964,[2] are employed as city drivers at the Company's Houston, Texas, terminal. In 1966, plaintiffs requested, but were denied, transfer from the Company's city driver classification to its over-the-road classification, because of the Company's long-standing[3] and consistently applied[4] policy which prohibits such transfers (Nickles Deposition, p. 12; Jones Deposition, p. 17; Hodge Deposition, pp. 7-8).

[2] Title VII was enacted on July 2, 1964, and became effective one year later. Pub. L. 88-352, § 716 (§ 716 of the Civil Rights Act of 1964). Plaintiffs Jones and Hodge were hired in May and December of 1964, respectively (Jones Deposition, p. 2; Hodge Deposition, p. 2). Plaintiff Nickles was hired in 1956 (Nickles Deposition, p. 2). The record contains no indication of when plaintiff Irving was hired.

[3] The no-transfer policy was adopted by the Company in 1957. Prior to that time the Company had occasionally permitted employees to transfer from one classification to the other. However, it found that such transfers were generally unsatisfactory and detrimental to the overall efficiency of its operations. Due to the drastic difference between the working conditions in the two classifications (the over-the-road job requires long absenses from home, whereas the city drivers are accustomed to regular working hours), employees who had been permitted to transfer seldom were satisfied and often sought to transfer back into their original classification. In addition, the Company experienced increased training costs as a result of these transfers. Finally, such transfers had in many instances resulted in the filing of grievances regarding the transferee's seniority because of the fact that the city driver and the over-the-road classifications are governed by different union contracts (Stipulation, pp. 2-5).

[4] In 1967 a manager at the Company's terminal in San Antonio, Texas, permitted an employee to transfer from the city driver classification to the over-the-road classification. However, when the Company learned of this deviation from its policy, the transfer was immediately revoked and the employee was reassigned to the city driver classification (Stipulation, pp. 3-4, 6-7).

In support of their contention that at the time of their respective hirings the Company discriminatorily limited Negroes to jobs within the city driver classification, plaintiffs relied exclusively on the Company's employment statistics which indicated that as of July 1 during the years 1964, 1966 and 1968, no Negroes were employed within the over-the-road classification, whereas during this same period Negroes comprised approximately 20% of the persons employed in the city driver classification (Interrogatories Nos. 7 and 9). There is no indication in the record that any of the plaintiffs ever applied for, expressed an interest in, or were denied employment as over-the-road drivers at the time of their hire. As noted by the Court of Appeals, "no specific instances of discrimination have been shown" (*infra*, p. 8a).[5]

The District Court Decision. The district court found that the Company's no-transfer policy is "a valid and bona fide departmental operation with valid restrictions on departmental transfer not based or applied on race, but established as a result of other rational and bona fide considerations" (*infra*, p. 3a).

With regard to plaintiffs' contention that the racial imbalance in the Company's over-the-road and city

[5] Indeed the only evidence on this point indicates that the Company had actively engaged in an affirmative action program to employ Negroes in the over-the-road unit:

> He would further testify that during the past two years Lee Way Motor Freight, Inc., has searched diligently to find qualified Negroes to operate over-the-road equipment here in Oklahoma City; that it has advertised in newspapers and has participated in virtually every community or governmental sponsored program; that thus far Lee Way has been successful in employing two Negro over-the-road drivers whose names are R. L. Williams and C. E. Bates, both of whom were employed on August 8, 1968 (Stipulation, p. 4).

driver classifications constituted a discriminatory employment practice, the court concluded that "the hiring of Negroes for a particular job category is clearly not contemplated by the Act" (*infra*, p. 4a).

Accordingly, the district court dismissed the action.

The Court of Appeals Decision. While noting that the reasons advanced in justification of the Company's no-transfer policy were "not insubstantial" (*infra*, p. 12a) and that "the Company did not adopt the policy with the intention of discriminating" (*infra*, p. 13a), the Court of Appeals, nevertheless, held that the policy as applied to plaintiffs "is an unlawful employment practice within the meaning of § 2000e-2(a) because it perpetuates past discrimination, by preventing them from now having jobs which were formerly denied to them because of their race, and because it does not satisfy the business necessity test" (*infra*, p. 13a).

The foundation for the Tenth Circuit's decision is its conclusion that at the time of plaintiffs' hire, they were discriminatorily excluded from the over-the-road classification because of their race. This conclusion is in turn based solely on the Company's employment statistics which showed no Negroes employed in the over-the-road classification during the period 1964-1968.[6] The court, therefore, ruled that plaintiffs must be granted an exemption from the Company's no-transfer policy.

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[6] The court appears to have assumed that the same condition prevailed prior to 1964 and noted that, "Nothing in the record leads us to believe that the situation was any different in preceding years" (*infra*, p. 8a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Represents a Radical and Novel Interpretation of Title VII and Conflicts With Decisions of the Sixth Circuit and Several District Courts

The decision of the Tenth Circuit erects a legal standard for determining the existence of unlawful discrimination under Title VII which represents a radical departure from the previous judicial construction of the Act. In no prior decision under the Act, including those relied upon by the court below, has unlawful discrimination been based solely on a statistical imbalance with regard to the race of employees.[7] Unlike this case, in previous Title VII cases employment statistics have been used only to support other evidence of discrimination.

Other circuit courts have held that employment practices which are racially neutral on their face may be invalidated where they perpetuate the effects of past (pre-Act) discrimination which has been *proven* to exist.[8] However, the Tenth Circuit view that such past discrimination can be established on the basis of statistics alone has been rejected by the Court of Appeals for the Sixth Circuit. Thus, in *United States* v.

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[7] Subsequent to the Tenth Circuit's decision, however, the Eighth Circuit held in *Parham* v. *Southwestern Bell Telephone Co.*, — F.2d — (1970), 3 CCH Emp. Prac. Dec. ¶ 8021, that a company's employment statistics "which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964."

[8] See, *e.g.*, *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970); *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *cert. granted* 399 U.S. 926 (1970); *United States* v. *Sheet Metal Workers' Int'l Assn., Local 36*, 416 F.2d 123 (8th Cir. 1969).

Electrical Workers (IBEW), Local 38, 428 F.2d 144 (1970), *cert. denied* 39 LW 3246 (December 7, 1970)," that court stated that in its opinion Section 703(j) of the Act

> prohibits interpreting the statute to require "preferential treatment" solely because of an imbalance in racial employment existing at the effective date of the Act."[9]

It is thus clear that with respect to the significance to be accorded employment statistics under Title VII, the Sixth and the Tenth Circuits are in sharp disagreement.

In addition, the position adopted by the Tenth Circuit has been squarely rejected by district courts in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D.

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[9] The Sixth Circuit in *Local 38* reversed the district court's decision because of its failure to grant appropriate affirmative relief, despite the fact that it had found specific instances of unlawful discrimination.

[10] *Local 38, supra*, 428 F.2d at 149. Significantly, the Sixth Circuit took no exception to the statement of the district court that

> Another point, which appears to be agreed upon by the decisions in which it has been considered, is that the simple absence of Negroes from a given group is not conclusive evidence of discrimination. [Citing *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968), and *United States* v. *Sheet Metal Workers' Int'l Assn., Local 36*, 280 F. Supp. 719 (E.D. Mo. 1968).] On the other hand, such a statistical demonstration coupled with a showing of specific acts of discrimination may be sufficient to make out a prima facie case.

United States v. *Electrical Workers (IBEW), Local 38*, — F. Supp. — (N.D. Ohio 1969), 59 CCH Lab. Cases ¶ 9226, p. 6918.

Va. 1968)," *Bing* v. *Roadway Express, Inc.*, —— F. Supp. —— (N.D. Ga. 1970), 3 CCH Emp. Prac. Dec. ¶ 8028,[17] and *United States* v. *Jacksonville Terminal Company*, 316 F. Supp. 567 (M.D. Fla. 1970).[18]

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[16] In *Quarles*, a landmark decision under Title VII, the court refused to find discrimination in supervisory employment and promotions, stating:

> The plaintiffs failed to introduce evidence proving their allegation that the company discriminated on racial grounds with respect to employment and promotions of supervisory personnel. The plaintiffs point to the small number of Negro supervisory employees in comparison with the large number of white supervisors. (7 Negroes, 243 white, as of February 9, 1967.) But the plaintiffs have not shown any instance of a qualified Negro being denied employment or a promotion to a supervisory position. 279 F. Supp. at 508.

[17] In *Bing*, a case involving almost exactly the same facts as this case, the court held:

> The fact that the road unit of the defendant at its Atlanta terminal is composed entirely of white employees does not show racial discrimination, without any evidence of discriminatory hiring practices for that particular category. 3 CCH Emp. Prac. Dec. ¶ 8028 at p. 6078.

[18] In *Jacksonville Terminal* the Court noted:

> Reliance upon a simple head count of Negroes versus white employees cannot satisfy the requirement of probative evidence to support a contention basic to the Government's case. Fundamentally, the Government rests its case upon an assumption that Negro employees were equally well-equipped as to skills and other qualifications as white employees but were treated differently and discriminated against solely because of their race.
>
> The Government's failure or refusal to undertake a comparative evaluation of the entitlement to job vacancies of competing Negroes and whites, upon the basis of individual qualifications, leaves the record without probative evidence to support a

II. The Decision Below Is Contrary to the Express Language of the Act and the Intent of Congress as Disclosed in the Legislative History

During the congressional deliberations which preceded the enactment of Title VII, Congress emphasized its intent that racial imbalances in employment were not to be construed as unlawful discrimination. Proponents of the Act consistently and repeatedly asserted that the Act was not intended to proscribe racial imbalances as unlawful *per se*. Thus, in its

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critical facet of the Government's case. 316 F. Supp. at 580-581.

See also *Penn* v. *Stumpf*, 308 F. Supp. 1238, 1243 (N.D. Cal. 1970), an employment discrimination case brought under the Civil Rights Acts of 1866, 1870 and 1871 and the Fourteenth Amendment, wherein the court noted that "a showing of a significant statistical discrepancy is not in itself dispositive . . . ." *Cf.* this Court's recent ruling on an analogous question in *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 338-339 (1970), where Mr. Justice Stewart, writing for the majority, stated:

> For present purposes we may assume that the State may no more exclude Negroes from service on the jury commission because of their race than from the juries themselves. But the District Court found the appellants had shown only that for many years the jury commission had been composed entirely of white men, and concluded that without more the appellants' attack failed for want of proof. We think that ruling was correct. Quite apart from the problems that would be involved in a federal court's ordering the Governor of a State to exercise his discretion in a particular way, we cannot say on this record that the absence of Negroes from the Greene County jury commission amounted in itself to a prima facie showing of discriminatory exclusion.
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> • • •
>
> The appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury.

report on an early version of Title VII,[14] the House Committee on Education and Labor stated:

> Nothing in the Act is intended to allow charges to be brought based upon disproportionate representation of members of any race, religion, color, national origin, or ancestry within any business enterprise or labor organization. General rules as to percentages, quotas, or other proportional representation shall not be the basis of charges brought under this Act.[15]

Similarly, the significance to be accorded minority underrepresentation or racial imbalance under Title VII was specifically considered in an interpretative memorandum jointly submitted by Senators Clark and Case, the floor managers of the House-approved bill:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.

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[14] "Title VII is in reality the so-called FEPC bill, H.R. 405, reported from the House Education and Labor Committee on July 22, 1963 . . . . The only major difference between the Subcommittee version (H.R. 405) and the compromise version is that the enforcement procedure was changed from the administrative type of cease and desist order to a de novo proceeding in court initiated by the Commission." H.R. Report No. 914, 88th Cong., 1st Sess., November 20, 1963 (additional views of Hon. George Meader), reported in 2 U.S. Code Cong. & Ad. News 2391, 2426 (1964).

[15] H.R. Report No. 570, 88th Cong., 1st Sess., July 22, 1963, which reported on H.R. 405.

> ***While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.***[10]

Despite these repeated assurances, some members of Congress remained skeptical and, therefore, specific clarifying language was proposed for the purpose of avoiding any ambiguity which might lead to an unintended construction of the Act. Ultimately, these efforts resulted in the inclusion of Section 703(j), which stated in relevant part:

> (j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter *to grant preferential treatment* to any individual or to any group because of the race . . . of such individual or group *on account of an imbalance which may exist* with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. 42 U.S.C. § 2000e-2(j) (emphasis supplied).

The effect of Section 703(j) was described by Senator Humphrey when it was introduced as part of the leadership compromise in the Senate, as follows:

> Ninth. A new subsection 703(j) is added to deal with the problem of racial balance among em-

[10] 110 Cong. Rec. 7213 (April 8, 1964) (emphasis supplied).

ployees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning."[17]

[17] 110 Cong. Rec. 12723 (June 4, 1964). See also the views of Richard K. Berg, who served as liaison from the Justice Department to the Senate leadership during the consideration of Title VII. Berg assessed the import of Section 703(j) as follows:

> Since doubts persisted, section 703(j) was inserted in the leadership compromise. It simply states that no one shall be required to remedy a racial imbalance by discrimination in favor of the disadvantaged group. It does not add to or detract from the probative force which evidence of racial imbalance may have in any given case.
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> • • •
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> The employer's practices prior to the effective date of the title and the composition of his work force on that date should be of only limited relevance, perhaps suggesting a disposition to discriminate, but not sufficient to destroy the ordinary presumption that he is complying with the law. To the extent that a complainant relies on evidence of racial imbalance to demonstrate discrimination, his case would have to be based primarily on a pattern of personnel actions taken after the title took effect. In addition, for such evidence to be meaningful there would have to be some sort of showing that qualified applicants of the race discriminated against had sought employment and been turned down. In short, there is no reason for an employer who intends to comply with Title VII to conclude that he must demonstrate compliance by discrimination in reverse.

Berg, "Equal Employment Opportunity Under the Civil Rights Act of 1964," 31 Brook. L. Rev. 62, 77-78 (1964).

The legislative history and the wording of the Act itself conclusively establish the intent of Congress that statistics showing racial imbalance may not serve as the sole basis for finding unlawful discrimination under the Act or for requiring an employer to take action or change policies in order to offset or "correct" such an imbalance. The decision of the court below cannot be reconciled with that legislative purpose and, moreover, contravenes the express language of the Act by requiring the Company "to grant preferential treatment" (*i.e.*, exemption from the Company's uniformly applied, business-justified, no-transfer rule) to plaintiffs "because of [their] race" (*i.e.*, Negro) "on account of an imbalance . . ." (*i.e.*, the fact that no Negroes were employed as over-the-road drivers from July 1, 1964, through July 1, 1968).

III. The Decision Below Creates Presumptions of Unlawfulness Which Jeopardize Employment Practices Throughout the Nation

The decision below constitutes a major threat to the employment practices of employers throughout the nation. By declaring that evidence of a racially unbalanced work force constitutes a prima facie case of unlawful discrimination, the Tenth Circuit has created a standard by which most American employers would be presumed guilty[18] and at the same time has deprived such employers of the means to disprove their guilt.

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[18] The employment statistics relied upon by plaintiffs in this case are not a unique phenomenon in American industry. It is an unfortunate but inescapable fact that racial imbalance characterizes employment in America generally. The Second Annual Report of the Equal Employment Opportunity Commission, June 30, 1967, reports the following occupational distribution for

Where charges relate to discrimination allegedly occurring in the recent past and against a specific individual, an employer may be able to rebut a presumption of discrimination based on employment statistics by showing that the charging party was unqualified or was otherwise rejected for nonracial reasons. However, where past discrimination against Negroes generally is alleged, as was done in this case, the employer's burden of rebutting presumed discrimination will frequently be insurmountable. Here testimony indicated that no Negro prior to 1968 had ever completed an application for the job in question (Interrogatories, No. 31), but the Tenth Circuit brushed this evidence aside with the observation that

> . . . because of the historically all-white make-up of the company's line driver category, it may well be that Negroes simply did not bother to apply. (*infra*, p. 8a).

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the 1966 work force in the Los Angeles, Chicago and New York Standard Metropolitan Statistical Areas:

	Los Angeles		Chicago		New York	
	Total Work Force (%)	Negro Work Force (%)	Total Work Force (%)	Negro Work Force (%)	Total Work Force (%)	Negro Work Force (%)
Officials & Managers	8.3	1.0	8.1	0.8	10.6	1.7
Professionals	11.3	2.3	6.0	0.9	9.9	2.5
Technicians	5.8	4.0	4.1	1.5	5.0	4.5
Sales Workers	6.8	2.7	6.8	1.6	8.1	3.0
Clerical	18.8	10.3	20.0	10.8	31.3	25.6
Craftsmen, Foremen & Kindred Workers	15.6	9.3	12.6	6.6	9.5	5.5
Operatives	18.9	31.5	24.6	37.1	10.6	17.0
Laborers	7.0	16.3	10.9	25.2	5.6	14.5
Service Workers	7.5	22.6	6.9	15.5	9.4	25.7

This approach leaves an employer, such as petitioner, powerless to defend itself against a charge of past discrimination even if it has kept and maintained detailed applicant records. Where no Negroes have applied, the employer cannot use its records to show that those not hired were unqualified or were less qualified than those employed or that they applied at a time when there were no vacancies. Its records will show simply that no Negroes applied or completed applications. But this, according to the Tenth Circuit, is not sufficient.

Although "past" or "pre-Act" discrimination is not itself a violation of Title VII, it may, as in this case, serve as an essential predicate for concluding that an employer's present practices and policies violate the Act. As indicated above, a number of circuit courts have held that employment practices such as seniority provisions, referral procedures or testing requirements which are racially neutral on their face, constitute unlawful perpetuation of *proven* past discrimination, where they adversely affect the opportunities of minorities and where they are not shown to be necessary to business operations.[19]

According to the court below, the business-necessity test cannot be satisfied simply by showing sound busi-

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[19] *See Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980 (5th Cir. 1969), *cert. denied* 397 U.S. 919; *United States* v. *Sheet Metal Workers' Int'l Assn., Local 36*, 416 F. 2d 123 (8th Cir. 1969); *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (4th Cir. 1970), *cert. granted* 399 U.S. 926 (1970). The Tenth Circuit cited these cases in support of its decision invalidating the Company's no-transfer policy (*infra*, pp. 9a-10a); however, unlike the present case, none of these decisions involved a finding of pre-Act discrimination based solely on employment statistics.

ness justification for the practice in question. Thus, the Tenth Circuit conceded that the Company's no-transfer policy could be justified in those terms, but declared it unlawful because the court was "not persuaded that the no-transfer policy is *essential* to the safe, efficient operation of the company's business" (*infra*, p. 13a) (emphasis supplied).

Such a test should be reserved for situations where the underlying discrimination has been proven by substantial evidence. Otherwise it could be used to upset a multitude of fair and soundly-based practices which apply generally to a racially unbalanced work force or which apply only to units in which the races are employed in disproportionate numbers. These practices, the varieties of which are as limitless as the employment situations in which they are found, might include, for instance, time limitations for bidding, for promotions or filing grievances, shift and other pay differentials and work rules and working conditions.

The words of caution expressed during the congressional deliberation on Title VII seem particularly appropriate in this regard:

> It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with

except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.[20]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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December 16, 1970

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[20] H.R. Report No. 914, Part 2, 88th Cong., 1st Sess., December 2, 1963, reported in 2 U.S. Code Cong. Ad. News 2391, 2516 (1964), which set forth the additional views of Representatives McCulloch, Lindsay, Cahill, MacGregor, Shriver, Mathias, and Bromwell on H.R. 7152.

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 68-33 Civil

MARCUS JONES, WILLIE B. HOBBS, CLAYTON NICKLES and CLARENCE L. IRVING, *Plaintiffs*,

v.

LEE WAY MOTOR FREIGHT, INC., *Defendant*.

Memorandum Opinion

Plaintiffs' action is based on Defendant's alleged commission of an unlawful employment practice prohibited by 42 U.S.C. 2000e-2(a)(1) and (2) (Act). Plaintiffs, who are negroes, are employees of Defendant at Houston, Texas, as City Drivers. They allege that they sought a transfer from such job to that of Over-the-Road or Line Driver which was allegedly refused by Defendant because of their race and color. Defendant denies that the requested transfers from one job to another was refused because of race or color. It contends that the refusal was pursuant to a long established business policy of forbidding transfers between the two job classifications and that such Company policy has been consistently applied since 1957 to all employees, regardless of race or color. The case has been submitted for determination on a stipulation of facts and briefs.

Section 2000e-2, Title 42 U.S.C.A., provides in pertinent part as follows:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

The facts show that the Defendant has had a Company policy since 1957 of prohibiting all transfers from City Driver to Over-the-Road Driver and vice versa and that this policy has been uniformly applied by Defendant since that time, with one exception. The exception arose because of a mistake by the Defendant's Terminal Manager at San Antonio in failing to follow the Company's published no-transfer policy. Upon learning of this violation of Company policy, the Defendant ordered that the transferred employee be transferred back but Union grievance action interceded and prevented correction of the mistake. It further appears that there have been no deviations in the application of this policy for reasons of race and the same has been applied to whites and negroes alike; that

whites as well as negroes have been denied such transfers under this policy. The reasons given by Defendant for the policy is the difficulty of adjustment to Over-the-Road work by City employees and vice versa and the expense of retraining caused by such transfers. This is based on Company experience revealing that City Drivers do not stay with Over-the-Road driving because it takes them from home and Over-the-Road Drivers are dissatisfied with the confinement of City work. And retraining is required upon such transfers being made. It does not appear that the policy is one that is discriminatory to Plaintiffs because they are negroes since the policy prohibits any transfers from the City Driver classification to the Over-the-Road classification and vice versa regardless of race or color. There is no showing that any City Drivers, either negro or white, with the one exception above mentioned, have been permitted by Defendant since 1957 to make the transfer sought by Plaintiffs.

The Defendant's policy of prohibiting transfers from City Driver to Over-the-Road Driver is, therefore, a valid and bona fide departmental operation with valid restrictions on departmental transfers not based or applied on race, but established as a result of other rational and bona fide considerations.'

' The instant case is distinguished from Quarles v. Philip Morris, Inc., 279 F.Supp. 505, cited in Plaintiffs' brief. In the instant case, the policy is a "no-transfer" policy. In Quarles, the policy permitted transfers, but the departmental seniority systems imposed a loss of employment seniority on one who sought and received a departmental transfer. 279 F.Supp. 505 at p. 513. Likewise, in the case of Bing v. Roadway Express, Inc., and International Brotherhood of Teamsters, Chauffers, [sic] Warehousemen and Helpers of America, USDC, N.D. Ga., Atlanta Div., CA No. 11144 (February 7, 1968), cited in Plaintiffs' brief, transfers were allowed from the "in town driver" classification to the "on the road driver" classification but seniority rights were not transferrable [sic]. Summary judgment was denied in the latter case but from the material furnished the Court by Plaintiffs, the result of the case when heard on its merits is not known.

Plaintiffs state in their reply brief that no negroes had been hired as Over the Road Drivers as of the institution of this suit and contend that such failure to hire negroes in an all white department is a discriminatory employment practice as to Plaintiffs and those similarly situated.[2] However, the hiring of negroes for a particular job category is clearly not contemplated by the Act. Section 2000e-(j) provides that an employer is not required to grant preferential treatment to any individual or to any group because of race on account of an imbalance which may exist with respect to the total number or percentage of persons of any race employed by an employer. *United States v. H. K. Porter Company*, 296 F.Supp. 40 (ND Ala. SD 1968).[3]

The Court, therefore, finds and concludes from the evidence that the Defendant has not violated the Act, as claimed by Plaintiffs, and this action should be dismissed. Counsel for Defendant will prepare an appropriate judgment based on the foregoing.

Dated this 23rd day of June, 1969.

Fred Daugherty
Fred Daugherty
United States District Judge

[2] Defendant states that it has been able to employ two negro Over-the-Road Drivers, has diligently tried but without success to find qualified negroes to operate Over-the-Road equipment despite advertising and participation in government sponsored programs.

[3] This case provides:

> "It was similarly reiterated in further chapters of the legislative history that 'The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group' . . ." 296 F.Supp. 40, at p. 69.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

July Term, 1970

No. 464-69

MARCUS JONES, WILLIE B. HOUSE, CLAYTON NICKLES and CLARENCE L. IRVING, *Plaintiffs-Appellants*,

v.

LEE WAY MOTOR FREIGHT, INC., *Defendant-Appellee*.

Appeal From the United States District Court for the Western District of Oklahoma.

(D.C. Civ. 68-33)

Opinion

S. Norman Sorrell of Mandell & Wright for Plaintiffs-Appellants.

John B. Dudley (Richard H. Champlin and Richard G. Taft, and McAfee, Dudley, Taft, Cates & Mark, of Counsel, were with him on the brief) for Defendant-Appellee.

David Copus (Stanley P. Hebert, General Counsel, Russell Specter, Deputy General Counsel, and Julia Cooper were with him on the brief) for Amicus Curiae Equal Employment Opportunity Commission.

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The plaintiffs-appellants, four Negro truck drivers employed by defendant-appellee Lee Way Motor Freight, Inc., allege in their complaint that the company's refusal to grant requested transfers was an unlawful employment practice in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. The case was heard on

answers to interrogatories and stipulated testimony. The district court found that the company's no-transfer policy was established for "rational and bona fide considerations" and was indiscriminately applied. Relief was denied, Jones v. Lee Way Motor Freight, Inc., W.D.Okla., 300 F.Supp. 653, and this appeal followed. Jurisdiction is found under 42 U.S.C. § 2000e-5(f).

The company has two categories of drivers, line (over the road) and city. Line drivers receive higher wages, and line jobs are generally considered superior to city jobs. Each group is covered by a separate union contract. Company policy prohibits transfers between the two groups. In 1964, 1966, and 1968, there were 353, 516, and 542 line drivers respectively. At all pertinent times all of the line drivers were white. For the same years the company employed 52, 169, and 196 city drivers of which 12, 33, and 38 (or about 20%) were Negro.

The no-transfer policy was initiated in 1957. The company says that it adopted the policy for valid reasons which include inability of transferees to adjust to new working conditions, difficulties such as seniority because each category is covered by a different union contract, and the retraining required for both the transferee and his replacement. There is no claim that the policy has been unfairly or discriminately applied.

Plaintiffs, employed as city drivers at the company's Houston terminal before July 2, 1965, the effective date of the Act, sought transfers to the line category in 1966. The requests were denied on the basis of the no-transfer policy. The plaintiffs went to the Equal Employment Opportunity Commission, which found reasonable cause to believe that the company was engaging in unlawful employment practices. Voluntary compliance was not achieved, and the plaintiffs brought this suit.

The essence of plaintiffs' claim is that application of the superficially neutral no-transfer policy to them is

discriminatory because it locks them in inferior jobs which were the only ones available in the days of the company's discriminatory hiring practices. They say that although the policy may be rational, it cannot be justified as necessary to the business, and therefore is an unlawful employment practice which violates § 2000e-2(a). To sustain their position, the plaintiffs rely heavily on cases holding that Title VII affords relief from present effects of past discrimination.

Plaintiffs do not rest their claim on discriminatory hiring and cannot, because they were hired before the Act became effective. However, discriminatory hiring is essential to their case because it is the premise of the argument that the no-transfer policy is discriminatory. The plaintiffs emphasize the employment statistics and urge that the district court misapprehended the value of this evidence in disclosing the company's pre-Act employment practices. In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts. State of Alabama v. United States, 5 Cir., 304 F.2d 583, 586, aff'd, 371 U.S. 37; United States v. Hayes International Corp., 5 Cir., 415 F.2d 1038, 1043; United States v. Sheet Metal Workers, 8 Cir., 416 F.2d 123, 127, n. 7; and Cypress v. Newport News General & Nonsectarian Hospital Ass'n, 4 Cir., 375 F.2d 648, 654.

In the case at bar, the statistics show that at no time between July 1, 1964, and March 1, 1968, did the company employ a single Negro line driver in spite of the fact that there were between 353 and 542 men in that category. Although all city drivers during this period were not Negroes, all Negro drivers were city drivers. The line driver group is sufficiently larger than the city driver group that approximately 80% of the white drivers are in the line category. In short, there were no Negro line drivers; most whites were line drivers; and all Negroes were city drivers.

In the light of the large number of line drivers, the statistics establish a prima facie case that during the 1964-1968 period race was a factor in staffing the two driver categories. See Turner v. Fouche, 396 U.S. 346, 360. Nothing in the record leads us to believe that the situation was any different in preceding years. The company's conclusory claims that it has never discriminated against Negroes in hiring line drivers do not overcome this prima facie case. Turner v. Fouche, supra, and Dailey v. City of Lawton, 10 Cir., —— F.2d ——. True, no specific instances of discrimination have been shown. However, because of the historically all-white make-up of the company's line driver category, it may well be that Negroes simply did not bother to apply. See United States v. Sheet Metal Workers, supra, 416 F.2d at 132, and Lea v. Cone Mills Corporation, M.D.N.Car., 301 F.Supp. 97, 102.

In any event, lack of specific instances does not rebut the fact that at no time before the institution of this action had the company employed a Negro line driver. The company's claimed recent efforts to recruit Negro line drivers and its hiring of two in August, 1968, do not change the situation, because our concern is with the employment practices at the time when the plaintiffs were hired. We conclude that when the plaintiffs were hired, the driver categories were staffed along racial lines to the extent that no Negroes would be hired as line drivers.

The next question is whether the pre-Act discriminatory hiring practices make application to the plaintiffs of the uniform and neutral no-transfer policy an unfair employment practice in violation of § 2000e-2(a), which provides:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The problem presented was first discussed in Quarles v. Phillip Morris, Inc., E.D.Va., 279 F.Supp. 505. In that case the company's plant was organized on racial lines so that certain departments had exclusively white employees and others exclusively Negro employees. After these discriminatory practices were stopped, interdepartmental transfers were allowed on a non-racial basis when vacancies occurred in an entry level job but the transferee lost his seniority and was placed at the bottom position within the new department. The court found that the result of this condition was to perpetuate the effects of discriminatory hiring because a Negro transferring to another department, into which he would not have originally been hired, would continue to be at a competitive disadvantage to the whites who had worked for the company for a shorter time but who had started in that department. After a careful review of the legislative history, the court concluded that the seniority provisions were inherently discriminatory and violated Title VII.

Since Quarles, numerous cases have held that superficially neutral policies violate Title VII if their effect is to perpetuate past racial discrimination. See Local 189, United Papermakers and Paperworkers v. United States, 5 Cir., 416 F.2d 980, cert. denied 397 U.S. 919 (job seniority); United States v. Sheet Metal Workers, supra, (union employment referrals); Griggs v. Duke Power Co.,

4 Cir., 420 F.2d 1225 (education requirement as criterion for transfer); and Local 53 v. Vogler, 5 Cir., 407 F.2d 1047 (union membership and referral); see also United States v. International Brotherhood of Electrical Workers, Local No. 38, 6 Cir., —— F.2d —— (union membership and referral).

We believe that in principle the case at bar is no different from those cited. Because of the company's employment policies at the time plaintiffs were hired, they were ineligible for consideration for jobs as line drivers. They were systematically relegated to the lower paying, lower status job of city driver. Now at a time when the company seems to be actively seeking Negro line drivers, plaintiffs are unable to compete for these jobs, without quitting their present jobs, because of the no-transfer policy. They are locked in jobs which, because of their race, were the only ones previously available to them. The situation is perhaps more critical than that in Quarles and some of the other cases. At least there the transfers were allowed, although under onerous conditions. In our opinion the no-transfer policy is a present effect of past discrimination when applied to the plaintiffs.

The company argues that because the no-transfer policy locks in white as well as Negro city drivers, it is not discriminatory. Roughly 80% of the white drivers were employed as line drivers. The 20% hired as city drivers presumably had the opportunity to apply as line drivers but either were not qualified or preferred city work. In any event, race was not a determinative factor in their employment as city drivers, as it was with the Negroes. Although the no-transfer provisions may have the same ultimate effect on both white and Negro city drivers, the difference in the factors underlying their initial employment as city drivers is sufficient to make the policy discriminatory as to the latter but not the former.

A neutral policy which is inherently discriminatory may nevertheless be valid if it has business justification. The

district court found that the no-transfer policy was "established as a result of other rational and bona fide considerations." Plaintiffs do not challenge this finding as such. Rather they contend that the court should have applied the more stringent, and correct, test of business necessity and that, measured against this standard, the no-transfer policy is not justifiable.

The Fifth Circuit has adopted the business necessity test. See Local 53 v. Vogler, supra, and Local 189 v. United States, supra. In Local 189, the court said, 416 F.2d at 989:

> "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose."

The Fourth Circuit, in Griggs v. Duke Power Company, supra, went further. Although it found that the employer's educational and testing requirements served a genuine business purpose, the court held that these requirements must be waived as to those Negroes who were locked in by a combination of the requirements and discriminatory hiring practices. 420 F.2d at 1230-1231. We believe that the issues with which we are concerned are not affected by the grant of certiorari in Duke. See 38 LW 3517.

The remedial nature of Title VII requires the adoption of the business necessity test. If employers or unions could pursue, upon a showing of mere rationality, neutral policies which have the effect of perpetuating past discrimination, the value of the principles developed in Quarles and subsequent cases would be eroded. When a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business. See Local 189 v. United States, supra, 416 F.2d at 989.

The three reasons advanced to justify the no-transfer policy are (1) bad experience with transfers in the past, (2) cost of training both the transferee and his replacement, and (3) grievances and other problems which might arise from the fact that the job categories are covered by different union contracts. There is no contention that the policy, adopted in 1957, seven years before the passage of the Act, was other than a bona fide effort by the company to resolve what it considered to be real problems. Although the reasons advanced in justification are concededly not insubstantial, we believe that they fall short of demonstrating business necessity.

The difficulties resulting from previous transfers, basically that the transferee had difficulty in adjustment and often requested retransfer, might be largely alleviated by screening plaintiffs in the same way that prospective line drivers are interviewed. The plaintiffs' willingness to pursue this case indicates that they genuinely want to be line drivers and militates against any conclusion that the company's experience with them will be the same as it was with previous transferees.

The training costs are somewhat illusory. To fill a line driver vacancy with a new hire rather than a transferee will entail as much training if not more because a transferee has some knowledge of company policy and procedure. The training of a new city driver to replace the transferee will entail some costs, but we believe that these would not be substantial enough to outweigh the detriment to the plaintiffs of permanently locking them in city drivers' jobs.

Much the same might be said of the potential personnel problems occasioned by transfers and resulting from two union contracts. These may never develop. The record shows that in the case of the one city driver who was inadvertently allowed to transfer, the union sided with him when the company tried to return him to his previous

job. We will not accord this contention greater weight then [sic] the plaintiffs' rights under Title VII. In short, we are not persuaded that the no-transfer policy is essential to the safe, efficient operation of the company's business.

To summarize, we hold that the no-transfer policy, as applied to plaintiffs, is an unlawful employment practice within the meaning of § 2000e-2(a) because it perpetuates past discrimination, by preventing them from now having jobs which were formerly denied to them because of their race, and because it does not satisfy the business necessity test. Although the company did not adopt the policy with the intention of discriminating, the practice was followed deliberately, not accidently [sic]. We conclude that the company "is intentionally engaging in an unlawful employment practice" within the meaning of § 2000e-5(g). See, e.g., Local 189 v. United States, supra, 416 F.2d at 996. This conclusion is not at odds with the provision of § 2000e-2(j) that the Act shall not be interpreted to require preferential treatment. In our opinion the present correction of past discrimination is not preferential treatment. See United States v. International Brotherhood of Electrical Workers, supra.

Section 2000e-5(g) authorizes the district court to "order such affirmative action as may be appropriate." In our opinion the no-transfer policy cannot be used to bar these plaintiffs from application for line jobs without surrendering their positions as city drivers. The company must consider such applications and judge them by the same standards as all other applicants. This form of relief will alleviate to some extent the present consequences of the company's past hiring policies. On the basis of the record presented and the statements of counsel at the time of argument, we express no opinion on the seniority problems which may arise in the event that one of the plaintiffs qualifies and is accepted for a line job.

Reversed and remanded for further proceedings consistent with this opinion.

IN THE

Supreme Court of the United States

October Term, 1970

No. 1113

LEE WAY MOVING STORAGE, INC., *Petitioner*,

v.

MARCUS JONES, ET AL., *Respondents*.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1113

LEE WAY MOTOR FREIGHT, INC., *Petitioner,*

v.

MARCUS JONES, ET AL., *Respondents.*

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

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* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

The instant case is one of major importance in the administration of Title VII of the Civil Rights Act of 1964. The questions presented are two-fold:

> *First*, whether statistical data showing a racially imbalanced work force or particular job classification is sufficient, standing alone, to establish a *prima facie* case of unlawful discrimination within the meaning of Title VII;[1] and
>
> *Second*, whether, when a *prima facie* case of unlawful discrimination has been established, the continued maintenance of racially neutral employment policies may be justified only where they are demonstrated to be "*essential* to the safe, efficient operation of the company's business" (431 F. 2d at 250) (emphasis added).

The National Chamber has heretofore addressed itself to the second of the above issues, and advanced to this Court the compelling reasons in favor of a "legitimate business purpose" rather than a "business necessity or essentialness" criterion, as an *amicus curiae* in *Griggs* v. *Duke Power Company*, No. 124, this term. Clearly, the illegitimacy of the "business essentialness" test is all the more apparent when it is joined in tandem with the far-reaching, and equally unwarranted, method of establishing *prima facie* discrimination invoked in the present case by the Tenth Circuit. To the extent, therefore, that this Court does not find it necessary in *Griggs* to resolve the permis-

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[1] Although only past or pre-Act discrimination is here involved, there is clearly no basis, if the Tenth Circuit's statistical imbalance test is proper, for applying a different standard for adjudicating allegations of current or post-Act discrimination. Cf. *Parham* v. *Southwestern Bell Telephone Company*, — F.2d —, 3 CCH Emp. Prac. Dec. ¶ 8021 (8th Cir., 1970).

sibility of such a criterion, the present case provides an appropriate vehicle for the resolution of this critical issue.

In the event, however, that *Griggs* does determine the test to be applied in gauging the merits of the defense raised to an allegation of unlawful discrimination, the additional question here presented similarly warrants resolution by this Court. If statistical evidence, in and of itself, is sufficient to establish a *prima facie* violation of Title VII, a countless variety of long-standing racially-neutral employment policies will be open to attack. Moreover, employers who have affirmatively sought to improve the racial composition of their work force may nevertheless be found to have engaged in unlawful discrimination if they have not achieved a fully integrated work force at all levels.[2] In short, if statistical imbalance is the only touchstone necessary for ascertaining a violation of Title VII, then virtually every employer in the nation, in one manner or another, may be considered a law-breaker.[3]

The interest of the National Chamber, therefore, in filing this brief *amicus curiae* urging that the petition

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[2] For example, in the present case it was stipulated that during the two-year period preceding the filing of the suit, Lee Way, in addition to "search[ing] diligently" for qualified blacks to fill over-the-road driver openings, also "advertised in newspapers and . . . participated in virtually every community or governmental sponsored program" in an effort to correct the racial imbalance in its over-the-road driver classification (Stipulation, p. 4).

[3] As Petitioner observes in his brief (pp. 14-15), it is an unfortunate but inescapable fact that racial imbalance, as well as sex and other disproportionate minority representation, continues to be widely prevalent in employment throughout the United States. The instant case, accordingly, where a fully integrated work force is still unrealized, is not a rare or isolated instance but one which remains common throughout the nation.

for writ of certiorari be granted, is based on the substantial and far-reaching consequences that the decision of the court below will have for American industry.

REASONS FOR GRANTING THE WRIT

1. The decision below will require the abandonment of numerous racially-neutral employment practices now serving legitimate and important business needs. Thus, in the trucking industry alone, where a tradition of separate bargaining units and different collective bargaining agreements for over-the-road and city drivers has prevailed for many years, the present holding outlawing the widely prevalent[4] no-transfer policy will have a significant impact.[5] A similar effect will also occur in numerous other industries. To cite a few of many possible examples:

> (a) Most employers today follow the practice of promoting employees from within their own ranks in order to encourage their continued employment and to hopefully inspire a higher level of performance. Although such a practice is neither essential to the "safe" or "efficient" operation of a business, it is nevertheless commonly recognized to be a sound and desirable employee relations policy. Yet, under the decision below,

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[4] See, e.g., *Bing* v. *Roadway Express, Inc.*, — F.Supp. —, 3 CCH Emp. Prac. Dec. ¶ 8028 (N.D. Ga., 1970) at 6077.

[5] Although the decision below would presumably allow the continued application of Lee Way's no-transfer policy to its white city and over-the-road drivers, it is doubtful that such a discriminatory application would be permitted by either the union representing those drivers or by an arbitrator in the event the matter is challenged in an arbitration proceeding.

any enterprise that has been marked by a prior or current statistical under-representation of Negroes, other minority employees or even females would be required to waive the application of such a promotional policy on the theory that the "present application" thereof locks the under-represented group out of higher-paying jobs and thereby serves to "perpetuate past racial discrimination."

(b) The application of the lower court's rationale would also jeopardize the stability of hundreds of thousands of pension and profit-sharing plans. Most of these plans have minimum yearly service requirements as a prerequisite to obtaining benefits thereunder.[6] Since these requirements could no more be justified on grounds of "business necessity or essentialness" than Lee Way's no-transfer policy, they would have to be waived or modified as to any minority group which had been historically under-represented in the employer's work force. The resultant effect on the benefits available to present members of such plans would be of staggering proportions.

(c) A countless variety of other equally *bona fide* employment practices would be subject to challenge if the decision below is allowed to stand. Particularly vulnerable are the interrelated provisions found in most present collective bargaining agreements giving senior employees preference with respect to lay-off and recall rights, as well as the privilege of bumping junior employees, in the event of a reduction in the work force. These and

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[6] See Bureau of Labor Statistics, United States Dept. of Labor, *The 100 Largest Retirement Plans*, 1960-1968 (October 1, 1969).

other manifold provisions assuring greater job security for older workers who are most severely affected during periods of economic slowdown and increased unemployment have become an ingrained part of our American tradition. They should not be disturbed absent the most compelling countervailing considerations.

2. The foregoing examples are neither hypothetical nor remote. In fact, the approach adopted by the Tenth Circuit may well force employes not only to abandon racially-neutral employment practices serving significant business ends, but also to engage in preferential treatment to members of under-represented groups in order to eliminate existing statistical imbalances and avoid potential liability. Thus, encouraged perhaps by the decision of the court below and notwithstanding the absence of any determination by this Court, the Equal Employment Opportunity Commission recently intervened in a rate proceeding before the Federal Communications Commission involving American Telephone and Telegraph Company, apparently predicated solely on statistical imbalances within that Company's work force, seeking, *inter alia*, an order from the FCC requiring that "no new Anglo male [be] hired into any position which is currently populated by a disproportionate number of Anglo males until all currently-employed women, blacks, Spanish-surnamed Americans and other minorities are given the opportunity to fill the vacant position." Petition for Intervention in *Equal Employment Opportunity Commission* v. *American Telephone and Telegraph Company*, as reported at BNA Daily Labor Report (Dec. 11, 1970), at p. F-2. Similarly, the Department of Justice also just instituted a pattern and practice suit

against the United States Steel Corporation at its Fairfield, Alabama, plant after seeking unsuccessfully to secure a voluntary commitment requiring that employer to allocate fifty percent of all office and clerical jobs to blacks. *United States* v. *United States Steel Corporation*, (N.D. Ala., 1970), as reported at BNA Daily Labor Report (Dec. 14, 1970), at p. A-5; N.Y. Times, December 15, 1970, at 1 and 30, col. 4.

3. In view of the express assurances given during the debates preceding the adoption of Title VII that its enactment would leave "management prerogatives . . . undisturbed to the greatest extent possible,"[7] the seriously disruptive impact of the decision below deserves the careful scrutiny of this Court.

The enactment of Title VII manifested a deep Congressional concern over the depressed economic condition of the Negro and other minority groups in American society.[8] Congress did not contemplate however that forced racial balance would be the means to solve the problem of discrimination in the national work force. Recognizing the futility of attempting to promote "equality with mathematical certainty" through the imposition of strict standards designed to "impose [a] forced racial balance upon employers or labor unions,"[9] Senators Clark and Case, the Senate floor managers of Title VII, made it clear that statistical data, while certainly relevant to determining whether

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[7] H.R. Report No. 914, Part 2, 88th Cong., 1st Sess., December, 1963, reported in 2 U.S. Code Cong. Ad. News 2391, 2516 (1964).

[8] See 3 U.S. Commission on Civil Rights, 1961, Report 187. See also Hearings on S. 773 before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Welfare, 88th Cong., 1st Sess. 116-19, 321-74, 433-55 (1963).

[9] H.R. Report No. 914, 88th Cong., 1st Sess. (1963), *supra* n. 7.

a particular individual has been discriminatorily denied employment or promotional opportunities, should not be given what is, in effect, the *conclusive* weight accorded here by the lower Court.[10] Indeed, to underscore this intent, Congress added Section 703(j) to the Act to assure that the absence of a racially balanced work force could never alone constitute sufficient evidence of unlawful discrimination.[11]

4. As in so many other areas of civil rights and industrial relations, Title VII requires an accommodation between all of the competing interests involved "with as little destruction of one as is consistent with the maintenance of the other."[12] Independent proof of unlawful discrimination could have been supplied in the instant case, for example, had it been shown that Negroes had applied for the over-the-road positions but had been systematically rejected. Instead, the uncontroverted evidence established no specific instances of discrimination and, indeed, that, prior to the filing of the present suit, no Negro had ever applied for an over-the-road job (431 F. 2d at 247; Interrogatories, No. 31). To find a violation of the Act in these circumstances surely does not seek to balance the important rights here at issue. The result is one which imposes an intolerably disruptive burden upon American industry and distorts the purpose and intent of Title VII.

[10] See Clark-Case Memorandum, 110 Cong. Rec. 7213 (April 8, 1964).

[11] See, e.g., § 703(j) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(j); 110 Cong. Rec. 12723 (June 4, 1964).

[12] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112. See also *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 323; *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34; *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375.

CONCLUSION

For the foregoing reasons, the Chamber urges this Court to grant the Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1970

NO._____

LEE WAY MOTOR FREIGHT, INC.,
Petitioner

vs.

MARCUS JONES, ET AL.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF OF MARCUS JONES, ET AL, IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District Court (Pet. App. 1a-4a) is reported in 300 F.2d 653. The opinion of the Court of Appeals (Pet. App. 5a-13a) is reported in 431 F.2d 245.

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1970. The petition for certiorari was filed on December 16, 1970, Mr. Justice White having extended the time for filing to December 16, 1970. The petition was received by counsel for Marcus Jones, et al, on December 22, 1970. The jurisdiction of this court is invoked under Title 28, U.S.C. §1254 (1).

STATUTES INVOLVED

Sections 703(a), 703(j) and 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C 2000e-2000e-15 are set forth in the Appendix to this brief, infra, pp. 11-12.

QUESTIONS PRESENTED

1. Whether Petitioner's present and continuing consequences of past discriminatory practices are in violation of Title VII of the Civil Rights Act of 1964.

a. By its non-transfer policy freezing an entire generation of Negro employees into discriminatory preferences engaged in before the effective date of Title VII of the Civil Rights Act.

b. By Petitioner's policy of barring Negroes from transferring to a previously all-white job category without showing that its non-transfer policy is necessary to the conduct of its business.

c. By following a policy of prohibiting Negroes to transfer to such previously all-white category when statistical evidence shows that Negroes, because of their race, were previously denied jobs as line drivers reserved for whites only.

STATEMENT

Respondents, four Negroes, instituted this action in the United States District Court for the Western District of Oklahoma complaining that they have been discriminated against in their employment in violation of Title 42, § 2000e-2(a) (§ 703a) of the Civil Rights Act of 1964.

The case was submitted to the District Court upon depositions and a stipulation consisting of Plaintiffs' depositions and that certain witnesses, if produced by petitioner would testify to certain facts. The District Court on January 23, 1969, rendered its opinion denying relief, 300 F. Supp. 653. The Court of Appeals reversed, 431 F.2d 245.

The record undisputedly shows that Petitioner Lee Way Motor Freight, Inc. employed its truck drivers in two distinct categories, line (over-the-road) and city. Line drivers (all white) receive substantially higher wages than city drivers. (Pet. App. 6a). Until the commencement of this action Lee Way had never employed any Negro as a line driver. (Pet. App. 8a) After commencement of this action in August of 1968, Lee Way hired two Negroes as line drivers. (Pet. App. 8a)

On July 1, 1964, Lee Way employed 353 line drivers, all of whom were white. In 1966 and in 1968, Lee Way employed 516 and 542 line drivers, all of whom were white. (Pet. App. 6a)

Traditionally, all Negro drivers employed by Lee Way were classified as city drivers. Respondents herein classified as city drivers, were employed prior to July 2, 1965, the effective date of Title VII. In 1968, Respondents sought transfer to the better paying line drivers posi-

tion. Their requests were denied because of Lee Way's "No transfer" policy, established in 1957, during which time the discriminatory practices prevailed. After such denial, Respondents filed charges of discrimination against Lee Way with the Equal Employment Opportunity Commission, which found that Lee Way's no-transfer policy locked Negro drivers into the jobs to which they were restricted previously in violation of Title VII. (Pet. App. 6a)

Respondents thereafter commenced this action, alleging that Lee Way's no-transfer policy, although it is applied to all city drivers without regard to race, is unlawful because it discriminated against Negro drivers by freezing them into the jobs in which they were restricted previously, when Lee Way filled jobs along racial lines. (Pet. App. 7a)

Lee Way, by way of defense, advanced business reasons for the adoption of the no-transfer policy—contending, that city drivers could not adapt to the line job; insisted that problems arose because separate collective bargaining agreements governed the two jobs; and that such transfers required Lee Way to train City drivers to be line drivers and to train new city drivers. (Pet. App. 6a) The Court of Appeals in reversing the District Court held that the total absence of Negroes showed that line drivers had been previously hired along racial lines stating (Pet. App. 13a):

> "* * * the no-transfer policy, as applied to Plaintiffs, is an unlawful employment practice within the meaning of §2000e-2(a) because it perpetuates past discrimination, by preventing them from now having jobs which were formerly denied to them because of their race, and because it does not satisfy the business necessity test."

ARGUMENT AND AUTHORITIES

Petitioner and Amicus seek to have this court adopt the oft rejected employers' contention that Title VII of the Civil Rights Act does not encompass the present and continuing effect of past discriminations. Persuasive authority has rejected such contention. While it is true that the Act was intended to have prospective application, relief is called for to remedy present and continuing effects of past discrimination. *Local 53 of International Association of Heat & Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047 (C.A. 5th, 1959), *U. S. v. Local 189*, 282 F.Supp. 39-44 (E. D. La., 1968) aff'd 416 F.2d 980 (5th Cir. 1969), *Quarles v. Philip Morris, Inc.*, 279 F.Supp. 505-516 (E. D. Va. 1968), *U. S. v. Hayes Int. Corp.*, 415 F.2d 1038 (5th Cir. 1969).

Title VII prohibits subtle, complex, as well as simple forms of discriminations. It is well established that employment practices which may not appear to be racially determined, but which, in fact, incorporate and perpetuate pre-Title VII discrimination are unlawful. See, e.g., *Griggs v. Duke Power Co.*, 420 F.2d 1225 (5th Cir., 1970). cert. granted 399 U.S. 926 (1970); *Local 189, Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. den'd 397 U.S. 919 (1970); *United States v. Electrical Workers (IBEW), Local 38*, 428 F.2d 144 (1970, cert. den'd December 7, 1970; *United States v. Sheet Metal Workers Int'l. Ass'n., Local 36*, 416 F.2d 123 (8th Cir. 1969). Title VII therefore requires elimination of job standards which have the effect of locking Negroes into the position to which they were restricted under prior overtly discriminating practices.

Petitioners' "No transfer policy" imposes on the Negro Respondents the continuation of the pre-existing discrimination. It is precisely such practice that was condemned in *Quarles v. Philip Morris*, 279 F.Supp. 505 (1968). In Quarles, the court condemned a transfer policy that cut off all pre-existing seniority, thus reducing the opportunity for advancement, stating:

> "* * * This method requires the transferee to sacrifice his employment seniority and take new departmental seniority based on his transfer date. Thus a Negro with ten years employment seniority transferring under a note of intent from the prefabrication department to the fabrication department takes an entry level position with departmental seniority lower than a white employee with years less employment seniority. These restrictions upon the present opportunities for Negroes result from the racial pattern of the company's employment practices prior to January 1, 1966. The restrictions do not result from lack of merit or qualification. A transferee under any plan must satisfy ability and merit requirements regardless of his seniority."

In the case at bar it is altogether eliminated. If they quit they cannot even apply for a job as line drivers or anything else. A more classic example of freezing these Negroes on this one job, without opportunity for either advancement or bettering themselves cannot be found.

In Quarles as Petitioners do here, Defendants contended that the present consequences of past discrimination were outside the coverage of the Act. The court in rejecting such contention stated:

> "* * * The defendants rely on legislative history to sustain their thesis; the text of the act does not sup-

port it. The plain language of the act condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act."

The law is settled that an employer may not utilize any job qualification procedure which has a discriminatory effect unless the procedure is necessary to the operation of the business. Petitioners did not show and the record is barren of any evidence of any compelling business necessity warranting its qualification procedures established by discriminatory effects on its employment practices. *Local 189, Papermakers and Paperworkers v. United States*, 416 F.2d 980-989 (5th Cir. 1969), cert. den'd 397 U.S. (1970). The opinion of the Court of Appeals conforms to the principles enunciated in Local 189 above.

Neither is there any merit to Petitioners' contention that the use of statistical evidence may not be used to establish violations of Title VII. It is the sum total of the evidence which determines the existence of present continuing past practices of discrimination. Such statistics, coupled with policies that lock in Negro employees in a given classification without opportunity of advancement, regardless of experience and ability are classical methods of racial discrimination. *Turner v. Fouche*, 396 U.S. 346, 360, 90 S.Ct. 532 (1970); *State of Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), aff'd per curiam 371 U.S. 37 (1962) ("In the problem of racial discrimination, statistics often tell much, and the courts listen."); *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969), cert. den'd 90 S.Ct. 612 (1970).

Indeed, in *Parham v. Southwestern Bell & Tele. Co.*, ___ F.2d ___, 3 CCH EPD, 8021 page 690 (8th Cir., 1970) (Violation established by statistics which "revealed an extraordinary small number of black employees"); *United States v. Hayes International Corp.*, 415 F.2d 1038, 1043 (statistical evidence "amply demonstrates a preliminary showing" sufficient to support preliminary injunction); *United States v. Sheet Metal Workers, Local 36*, supra; *United States v. Dillon Supply Co.*, 429 F.2d 800 (4th Cir., 1970). The legislative history of Title VII shows that Congress intended statistical information to be used as evidence of discriminatory practices, 110 Cong. Rec. 7213 (April 8, 1964).

There can be no doubt that the decision of the Court of Appeals with respect to the adequacy of the proof showing a violation of Title VII is consistent with respected authority and Congressional intent. This case does not warrant this court's attention.

Amicus on page 3, note 2 of its brief erroneously states that:

> "It was stipulated that during the two year period preceeding the filing of the suit, Lee Way in addition to 'searching diligently' for qualified blacks to fill over-the-road driver openings, also advertised in newspapers and * * * participated in virtually every community or governmental sponsored program in an effort to correct racial imbalance in its over-the-road driver classification."

There was no such stipulation of fact. It was only stipulated that if the executive vice-president of Lee Way Motor was called as a witness he would testify to certain set out facts. This is a far cry from a stipulation of a fact.

Petitioner and the Amicus brief seek to transform this case into one consisting of "Preferential Treatment" of Negroes. But not so. The Appellate Court clearly held that Lee Way must consider applications for line drivers from Negro city drivers and "judge them by the same standards as all other applicants" (Pet. App. 13a). Obviously this remedial order only required Lee Way to permit objectively qualified Negroes to have an opportunity to transfer to a more desirable job without being shackled to an inherently discriminatory standard.

The Court of Appeals did not hold the present racial imbalance in Lee Way's work force was per se unlawful, nor did it order the imbalance ended. All it did was to insist that present continuation of past discriminatory practices cease. It is crystal clear that this is not a case involving 703(j). Indeed, because of the enormous, uncontrovertible, racial imbalance in Petitioner's work force, even if Plaintiffs succeed in becoming line drivers the effect will be imperceptible. To inject 703(j) into this case would nullify the purposes of the act against continuing effects of past discrimination, *U. S. v. Electrical Workers (IBEW) Local 38*, 428 F.2d at 149, emasculate the heart of the Act and open wide the door to open as well as subtle violations. Petitioner's interpretation of the Act is entirely contrary to the Congressional intention of ending employment discrimination and to the trend of judicial decisions recognizing that it is "the duty of the courts to make sure the Act works, and the intent of Congress is not hampered by a combination of strict construction of the statute and a battle with semantics." *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970). See also, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) ("This grant of

authority [under 706(g)' should be broadly read so as to effectively terminate the practice and make its victims whole."); *Rosen v. Public Service Electric and Gas Co.*, 409 F.2d 775, 781 (3rd Cir. 1969).

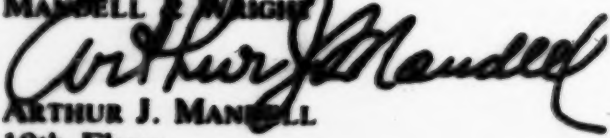
It is clear that the court below acted well within the authority granted to it under Section 706(g) and that the remedy in this case was entirely appropriate. The question does not warrant review by this Court.

CONCLUSION

The opinion of the Court of Appeals is grounded on sound legal principles and recognized authority. It is therefore respectfully prayed that Petitioner's application for a writ be denied.

Respectfully submitted,

MANDELL & WRIGHT



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APPENDIX

Title 42, U.S.C.A., § 2000e-2. *Unlawful employment practices—Employer practices* (703 a)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2. Preferential treatment not to be granted on account of existing number or percentage imbalance. (703 j)

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment agency or labor organization, admitted to member-

ship or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

§ 2000e-5. Injunctions; appropriate affirmative action; reinstatement, hiring, back pay; reduction of back pay by interim earnings or amount earnable; limitations on judicial orders (706 g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1113

LEE WAY MOTOR FREIGHT, INC., *Petitioner*,

v.

MARCUS JONES, ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

In their brief in opposition to petitioner's writ of certiorari which was filed with the Court on January 22, 1971, respondents have presented arguments which, we believe, tend to obscure the important issue with respect to which petitioner has sought review by this Court.

Contrary to respondents' assertions (Brief in Opposition pp. 5-6), petitioner *does not* herein argue that present employment practices which tend to perpetuate the effects of past discrimination are exempt from attack under Title VII. What petitioner does question, however, is the propriety of the Tenth Circuit's application of the "present effects" doctrine to strike down racially neutral employment practices which are founded on admittedly legitimate business purposes, where, as in this case, the court's conclusion of "past discrimination" (*i.e.*, discriminatory hiring) rests exclusively on statistics evidencing a pre-Act racial imbalance in the employer's workforce.

Nor are respondents correct in that suggestion that petitioner is contending that "statistical evidence may not be used to establish violations of Title VII." (Brief in Opposition p. 7). Quite to the contrary, petitioner concedes that such statistics are significant and relevant factors to be considered in civil rights cases. The question raised by petitioner is not whether "statistics often tell much," *State of Alabama* v. *United States*, 304 F.2d 583, 586 (1962), *aff'd per curiam* 371 U.S. 37 (1962), but rather whether statistics *standing alone tell enough* to warrant a conclusion of unlawful discrimination.

Insofar as respondent suggests that racial statistics alone are a legally sufficient basis for concluding unlawful discrimination, the cases cited (Brief in Opposition pp. 7-8) are inapposite. In each of those cases, with the exception of *Parham* v. *Southwestern Bell Telephone Co.*, — F.2d — (8th Cir. 1970), 3 CCH Emp. Prac. Dec. ¶ 8021, statistics comprised only one element of the sum total of the evidence relied upon.

Thus, the Tenth Circuit's decision in this case and that of the Eighth Circuit in *Parham*, which was decided after this case, are unique with regard to their treatment of statistics as dispositive of the issue of discrimination.

The decision of the Tenth Circuit erects a standard for proof of discrimination which presumes most employers to have been guilty in the past. It also imposes a test for determining the lawfulness of present employment practices which an employer cannot satisfy by showing that such practices were initiated and are maintained for good business reasons. Consequently, the Tenth Circuit decision represents a major threat to the legality and stability of employment practices throughout the country. It places in doubt the validity of employment practices whenever minority workers have not been employed in proportion to their percentage in the local work force despite the fact that the practices admittedly have been instituted and applied for legitimate business reasons and without regard to race. Thus, the action of the Tenth Circuit provides precisely the kind of preferential treatment Congress expressly declared was not required by Title VII of the Civil Rights Act of 1964.

As noted by the Tenth Circuit, (Petition p. 7a), the Court's finding of discriminatory hiring is the *essential premise* to its ultimate conclusion that petitioner's no-transfer policy unlawfully perpetuates the effects of past discrimination. To the extent that the essential premise for the court's finding is based solely on the statistical evidence of racial imbalance, it represents a precedent of dubious merit and broad national consequence and thus warrants review by this Court.

CONCLUSION

For the foregoing additional reasons, the petition should be granted.

Respectfully submitted,

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